IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5103

JOHN J. MORRISSEY and G. DONALD BOOHER,

Petitioners,

—v.—

LOU V. BREWER, Warden,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MELVIN L. WULF
MICHELE HERMANN
HERMAN SCHWARTZ
ROBERT PLOTKIN
RICHARD SINGER
JOEL GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010
Attorneys for Amicus Curiae

INDEX

Authorities Cited

Cases:

PAGE

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5103

JOHN J. MORRISSEY and G. DONALD BOOHER,

Petitioners,

—v.—

LOU V. BREWER, Warden,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide, non-partisan organization of over 170,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-one year existence the ACLU has been particularly concerned with the fundamental guarantees of due process of law under the Fourteenth Amendment. In the past several years, the ACLU has also become involved in prisoners' rights cases and with bringing the protections of due process of law to the prisons. More recently, a National Prisoners' Rights Project has been instituted by the ACLU to increase our commitment to this area of crucial national concern. Based

* Letters of consent from the State of Iowa and from counsel for Petitioners have been filed with the clerk of the Court.

on our experience, we feel this case is a vitally important one, and believe that our brief will be of substantial assistance to the Court.

The Question Presented

Whether revocation of parole or probation[1] without notice of charges or a hearing violates the Fourteenth Amendment of the United States Constitution by depriving a person of liberty without due process of law.

I.

Introduction.

The two petitioners in this case were granted parole by the state of Iowa. Subsequently, each was arrested as a parole violator and returned to prison. Neither was given any notice of the reasons for revocation of their parole

[1] Throughout this brief, arguments will be made which apply to the revocation of both probation and parole, since "(t)he central fact, which applies to both probation and parole revocations, is that revocation is the event which operates to deprive a man of his liberty." *Goolsby* v. *Gagnon*, 322 F. Supp. 460, 463 (E.D. Wis. 1971). This proposition is widely accepted. See *Bearden* v. *State of South Carolina*, 443 F.2d 1090, 1097-98 (4th Cir. 1971) (*en banc*) (Winter, *J.*, concurring in part and dissenting in part); *United States ex rel. Bey* v. *Connecticut State Board of Parole*, 443 F.2d 1079, 1087 (2d Cir. 1971); *Morrissey* v. *Brewer*, 443 F.2d 942, 959-960 (8th Cir. 1971) (Lay, *J.*, dissenting); *Rose* v. *Haskins*, 388 F.2d 91, 98, 103 (6th Cir. 1968) (Celebrezze, *J.*, dissenting); *United States ex rel. Carioscia* v. *Meisner*, 331 F. Supp. 635, 647 (N.D. Ill. 1971); *People ex rel. Menechino* v. *Warden*, 27 N.Y.2d 376, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449 (1971); *Warren* v. *Michigan Parole Board*, 23 Mich. App. 754, 179 N.W.2d 664, 670 n. 22 (Ct. App. 1970), *appeal dismissed*, 384 Mich. 812, 184 N.W.2d 457 (1971); Comment, *Due Process and Revocation of Conditional Liberty*, 12 Wayne L. Rev. 638 (1966); S. Rubin, *Due Process Is Required in Parole Revocation Proceedings*, June *Federal Probation* 42, 45 (1963).

or an opportunity to contest or respond to the charges. No hearing was held, no witnesses were called to testify against petitioners, no opportunity to summon witnesses was afforded them. No counsel was allowed to assist petitioners, no findings were made regarding the alleged violations.[2] In short, each man was snatched off the streets and summarily returned to prison.[3]

Petitioners in this case each had parole revoked for technical violations involving disputed issues of fact. Petitioner Booher was re-imprisoned because it was alleged that he left the territorial limits of O'Brien County without permission, and obtained a driver's license under an assumed name after his own was revoked. Petitioner Morrissey was re-imprisoned on charges that he purchased an automobile under an assumed name, drove a car without permission, and purchased furniture under an assumed name to obtain credit. Both men, when they finally learned why they had been re-imprisoned, denied the truth of the charges against them. They have spent the last three years in prison on the basis of unproven allegations which they wish, but have never been allowed, to challenge.

The issue presented by this case is a relatively simple one: is the Due Process Clause of the Constitution violated by imprisoning a man for a long period of time on another

---

[2] See *Curtis* v. *Bennett*, 256 Iowa 1164, 131 N.W.2d 1 (1964), *cert. denied*, 380 U.S. 958 (1965), holding that Iowa law does not require a hearing upon the revocation of parole.

[3] "... the probationer may be 'revoked' at an *ex parte* proceeding and learn about the revocation only while in the sheriff's van on the way to prison. If he is told why he was revoked, he may have to be satisfied with the answer that the judge did not feel that he was making a satisfactory adjustment." F. Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 Tex. L. Rev. 1 (1969).

man's unsubstantiated allegations that he has violated a condition of his parole?

The language of the Fourteenth Amendment is clear—a man cannot be deprived of his liberty without due process of law. Before a man can be sent to prison, our most fundamental notions of fairness require at the very least that he be informed of the charges upon which he is being imprisoned and that he be afforded the opportunity to respond to them. Because this opportunity was denied petitioners, they have been unconstitutionally imprisoned.

II.

The seriousness of the loss of a man's freedom, fundamental concepts of fairness, and basic penological goals of rehabilitation all require the application of due process before the revocation of probation and parole.

An overwhelming number of State and Federal courts, relying primarily upon *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and *Mempa* v. *Rhay*, 389 U.S. 128 (1967),[4] have come to recognize that the deprivation of freedom suffered by a person whose probation or parole is revoked is such

[4] *Mempa* has been used primarily to support the proposition that due process requires the assistance of counsel at probation and parole revocation hearings. See, e.g., *Gunsolus* v. *Gagnon*; 10 Cr. L. 2282 (7th Cir. Dec. 28, 1971); *United States ex rel. Bey* v. *Connecticut State Board of Parole*, *supra*, n. 1; *Hewett* v. *North Carolina*, 415 F.2d 1316 (4th Cir. 1969); *Ashworth* v. *United States*, 391 F.2d 245 (6th Cir. 1968) (*per curiam*); *Goolsby* v. *Gagnon*, *supra*, n. 1; *Scarpelli* v. *Gagnon*, 317 F. Supp. 72 (E.D. Wis. 1970); *People ex rel. Menechino* v. *Warden*, *supra*, n. 1; *Warren* v. *Michigan Parole Board*, *supra*, n. 1; *Commonwealth* v. *Tinson*, 433 Pa. 328, 249 A.2d 549 (1969); *Gargan* v. *State*, 217 So.2d 578 (Ct. App. Fla. 1969); *State* v. *Seymour*, 98 N.J. Super. 526, 237 A.2d 900 (1968).

a grievous loss that due process standards must be applied to the proceedings.[5]

As the Tenth Circuit Court of Appeals said recently, in *Murray* v. *Page*, 439 F.2d 1359, 1361-62 (10th Cir. 1970):

> The interest of the individual parolee is obviously very great. He has been found guilty of a crime, deemed worthy of rehabilitation and consequently given the privilege of parole. Parole revocation therefore terminates a valued, if conditional, liberty; personal freedom—whether classified as a grace, privilege or as constructive custody—has been unalterably rescinded.
>
> * * * * * *
>
> Therefore while a prisoner does not have a constitutional right to parole, once paroled he cannot be deprived of his freedom by means inconsistent with due process. The minimal right of the parolee to be informed of the charges and the nature of the evidence against him and to appear and be heard at the revocation hearing is inviolate. Statutory deprivation of this right is manifestly inconsistent with due process and is unconstitutional.[6]

---

[5] All but eight states afford minimum due process upon the revocation of parole. See Appendix A, which sets forth the law regarding parole revocation hearings in all states.

[6] Accord: *Gunsolus* v. *Gagnon*, *supra*, n. 1 (due process requires counsel at probation revocation hearing); *Beardon* v. *South Carolina*, *supra*, n. 1 (hearing required for revocation of probation); *United States ex rel. Bey* v. *Connecticut State Board of Parole*, *supra*, n. 1 (due process requires counsel at parole revocation hearing); *Hahn* v. *Burke*, 430 F.2d 100 (7th Cir. 1970) (hearing required for revocation of probation); *Murphy* v. *Turner*, 426 F.2d 422 (10th Cir. 1970); *Alvarez* v. *Turner*, 422 F.2d 214 (10th Cir.

The judicial position that due process requires a hearing upon the revocation of probation or parole is supported by virtually all those who have studied the area. The Task Force on Corrections of the President's Commission on Law Enforcement and the Administration of Justice declared:

> [T]he need to insure that coercive decisions vitally affecting the lives of offenders are not made through prejudice, on the basis of inadequate or incorrect information, or without rational relation to their purposes or justifications, requires significantly greater safeguards than now exist in most correctional systems. President's Commission on Law Enforcement and Administration of Justice, *Corrections* 13 (1967).

The Task Force recommended that all decisions which potentially affect conditional liberty be rendered only after a hearing:

> 'It is inconsistent with our whole system of government to grant such uncontrolled power to any officials, particularly over the lives of persons. The fact that

---

1970) (minimum due process hearing required for revocation of parole); *Howett* v. *North Carolina*, *supra*, n. 4 (due process requires counsel at probation revocation hearing); *Eleanor* v. *Hammond*, 116 F.2d 982 (6th Cir. 1941) (hearing required for revocation of conditional pardon); *United States ex rel. Carioscia* v. *Meisner*, *supra*, n. 1 (due process required for parole revocation hearing); *Goolsby* v. *Gagnon*, *supra*, n. 1 (hearing required for revocation of parole); *Klotz et al.* v. *Ohio Adult Parole Authority*, 330 F. Supp. 665 (N.D. Ohio 1971) (urges overruling *Rose* v. *Haskins*, *supra* and requiring hearing for revocation of parole); *People ex rel. Menechino* v. *Warden*, *supra*, n. 1 (due process requires hearing with counsel before parole revocation); *Warren* v. *Michigan Parole Board*, *supra*, n. 1 (due process requires counsel at parole revocation hearing); *Chase* v. *Page*, 456 P.2d 590 (Okl. Cr. 1969) (hearing required for revocation of parole).

a person has been convicted of a crime should not mean that he has forfeited all rights to demand that he be fairly treated by officials . . .

For some kinds of decisions, such as decisions to revoke probation or parole, offenders should be accorded the basic elements of due process, such as notice, representation by counsel, and opportunity to present evidence and to confront and cross-examine opposing witnesses. *Id.* at 83, 84.[7]

This view is supported by every other major study of the criminal law, corrections, and due process to discuss this issue in the last few years. The A.B.A. Project on Minimum Standards of Criminal Justice, *Standards Relating to Providing Defense Services* (Approved Draft 1968), recommends the appointment of counsel in parole revocation proceedings, clearly envisioning a hearing in every such instance. The American Law Institute's Model Penal Code provides for a hearing in every parole revocation, with the assistance of counsel. American Law Institute, *Model Penal Code*, §301.4, §305.15(1) (Proposed Official Draft 1962).

Commentators further agree not only that is a hearing on parole revocation constitutionally required, but that it is required by sound penology as well.[8]

---

[7] See also, A.B.A. Project on Minimum Standards of Criminal Justice, *Standards Relating to Probation* (Approved Draft 1970); President's Commission on Law Enforcement and the Administration of Justice, *Corrections* (1967); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967).

[8] F. Cohen, *Sentencing*, 47 Tex. L. Rev., *supra*, n. 3; W. Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 U. Colo. L. Rev. 197 (1970); K. Davis, *Administrative*

This overwhelming concensus as to the need for a hearing upon revocation of probation or parole demonstrates the breadth of support for the claim that failure to grant such a hearing will stifle the very rehabilitative processes which both the parole and corrections systems are intended to foster.[9] The parolee or probationer is returned to society where he is encouraged to adopt its values and its respect for human dignity, liberty and freedom. For society to thrust him back into prison without affording even an opportunity to be heard encourages embitterment and frustration.

> The parole system is an enlightened effort on the part of society to rehabilitate convicted criminals. Certainly no circumstance could further that purpose to a greater extent than a firm belief on the part of such offenders in the impartial, unhurried, objective and thorough processes of the machinery of law, and hardly any circumstance could with greater effect im-

---

Law Treatise, §7.16 (1958); R. Dawson, *Sentencing—The Decision as to Type, Length and Conditions of Sentence* (American Bar Foundation 1969); S. Kadish, *The Advocate and the Expert in the Penal-Correctional Process*, 45 Minn. L. Rev. 803 (1961); Tobriner, *Due Process Behind Prison Walls*, The Nation, Oct. 18, 1971; Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 Cal. L. Rev. 1215 (1971); Comment, *Parole Status and the Privilege Concept*, 1969 Duke L.J. 139; Comment, *Procedural Safeguards in Federal Parole Revocation Hearings*, 37 Nw. U.L. Rev. 737 (1963); Comment, *Due Process*, 12 Wayne L. Rev., *supra*, n. 1; Comment, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 Yale L.J. 368 (1962); Note, *Parole Revocation Procedures*, 65 Harv. L. Rev. 309 (1951); Note, *Discretionary Revocation of Probation and Parole, The Import of Mempa v. Rhay to the Present System*, 4 U.S.F.L. Rev. 160 (1969); Note, *Re-Arrest of Parolees: Constitutional Considerations*, 46 Wash. L. Rev. 175 (1970).

[9] See, *e.g.*, Comment, *Observations on the Administration of Parole*, 79 Yale L.J. 698 (1970).

> pede progress toward the desired end than a belief on their part that the machinery of the law is arbitrary, technical, too busy, or impervious to facts. *Fleming* v. *Tate*, 156 F.2d 848, 850 (D.C. Cir. 1946).

It must be recognized that "the need for fairness is as urgent in the parole process as elsewhere in the law . . ." *Monks* v. *New Jersey*, 58 N.J. 238, 277 A.2d 193, 195 (1971). It is fundamentally unfair to take away the freedom of probationers or parolees under conditions which encourage arbitrary actions by failing to afford even the most minimal protections of due process. "[O]ur constitutional scheme does not contemplate that society may commit law breakers to the capricious and arbitrary actions of prison officials." *Sostre* v. *McGinnis*, 442 F.2d 178, 198 (2d Cir. 1971) (*en banc*). As the Second Circuit Court of Appeals stated in *United States ex rel. Bey* v. *Connecticut State Board of Parole*, *supra*, 443 F.2d at 1089:

> Chief Justice Burger has recently commented on the seeming effectiveness with which "typical" prison systems in this country "brutalize and dehumanize" inmates . . . One certain way to increase a prisoner's sense of resentment and to discourage his will eventually to return to a normal life would be to deny him basic safeguards essential to the fundamental fairness of a decision to deprive him of the liberty he gained upon parole release.

Finally, it must be noted that, as demonstrated by Appendix A, all but eight of the states now hold hearings upon the revocation of probation and parole, some with a full panoply of trial-type rights including representation of counsel. It seems obvious that the administrative incon-

venience caused by requiring hearings cannot be very great if such an overwhelming number of states conduct them,[10] though expenses incurred by holding such hearings could not constitutionally justify their denial. *Bell* v. *Burson*, 402 U.S. 433, 435 (1971).[11]

III.

The traditional justifications for denying due process at the revocation of probation or parole are neither logically nor legally sound.

A. *The Conditional Liberty Enjoyed by a Person on Parole or Probation Is Not a Matter of "Grace" Which Can Be Revoked at the Whim of the State.*

It has traditionally been said that parole and probation are privileges bestowed as an act of grace by the State and can therefore be withdrawn at will, without the need for procedural due process. Cf. *Escoe* v. *Zerbst*, 295 U.S. 490 (1935). But this Court in recent years has rejected the theory that characterization of an interest as a "privilege" rather than a "right" justifies summary termination without due process of law. In *Goldberg* v. *Kelly*, *supra*, the Court held that welfare recipients must be given a hearing before their benefits could be terminated.

---

[10] See also: R. Dawson, *Sentencing*, A.B.A., *supra*, n. 8; Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493, 540-550 (1970); S. Kadish, 45 Minn. L. Rev., *supra*, n. 8; S. Rubin, *Developments in Correctional Laws*, Crime and Delinquency 185 (April 1970); R. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. Crim. L.C. & P.S. 175, 197 (1964).

[11] For a refutation of the traditionally advanced arguments on the detrimental impact hearings would have on the parole and probation system, see *Rose* v. *Haskins*, *supra*, 388 F.2d at 101-102 (Celebrezze, *J.*, dissenting); Comment, *Due Process*, 12 Wayne L. Rev. 1, *supra*, n. 1; authorities cited, n. 10, *ante*.

> The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right'" . . . The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, *J.*, concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the government interest in summary adjudication. 397 U.S. at 262-263.

Goldberg v. *Kelly* is only one of a long line of Supreme Court cases which recognize that wherever freedom or security is threatened, due process protections must be accorded, whether the impending loss is characterized as a "privilege" or a "right". Thus, those facing discharge from employment, *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956), or those brought before investigating committees, *Hannah* v. *Larche*, 363 U.S. 420 (1960), are entitled to an adequate notice of charges and a hearing on those charges.[12]

Cases which have applied the *Goldberg* rule, which weighs the seriousness of the threatened loss against the inconvenience to the State of applying due process, have found that the loss of a variety of benefits, all of which may be said to be less significant than imprisonment, are

[12] See also, *Sostre* v. *McGinnis*, *supra* (due process hearing required before time credited to prisoner's sentence can be taken away or other serious punishment imposed); Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968); K. Davis, *Administrative Law Treatise* §7.04 (1970 Supp.), §7.11 (1955).

sufficiently grievous to require hearings. These include garnishment of wages,[13] loss of a driver's license,[14] loss of the ability to purchase liquor,[15] expulsion from school,[16] expulsion from public housing,[17] and termination of water.[18] See also, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Speiser* v. *Randall*, 357 U.S. 513 (1958).

To lose one's freedom and be returned to prison for a number of years is assuredly to "suffer a grievous loss," and the interest in avoiding that loss of freedom certainly "outweighs the governmental interest in summary adjudication." *Goldberg* v. *Kelly*, *supra*; 397 U.S. at 263.[19]

In balancing the inconvenience and cost to the state against the possible wrongful loss of an individual's freedom, for many years, the result is clear. Parole and probation revocation represent such drastic curtailments of freedom that due process standards must be applied. As the Court wrote recently in *Boddie* v. *Connecticut*, 401 U.S. 371, 377-378 (1971):

> Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person

[13] *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

[14] *Bell* v. *Burson*, *supra*.

[15] *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971).

[16] *Sher* v. *Board of Education*, 424 F.2d 741 (3rd Cir. 1970).

[17] *Escalera* v. *New York City Housing Authority*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

[18] *Davis* v. *Weir*, 328 F. Supp. 347 (N.D. Ga. 1971).

[19] Compare: *Menechino* v. *Oswald*, 430 F.2d 403 (2d Cir. 1970) (no due process required at initial application seeking *grant* of parole) with *United States ex rel. Bey* v. *Connecticut State Board of Parole*, *supra*, n. 1 (full due process including counsel required at *revocation* of parole).

> or his property, there he may defend.' The theme that 'due process of law signifies a right to be heard in one's defense' has continually recurred. . . : Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' . . . there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the case [citations omitted].

B. *Due Process Guarantees Apply to the Revocation of Probation and Parole Even if the Probationer or Parolee Is Considered in Some Sense Still to Be "in Custody" Although Released From Prison.*

The other major theory which has been heavily relied upon to deny minimal due process guarantees in revocation of probation or parole equates the parolee or probationer with the prison "trusty" who, although he may be permitted outside the prison walls, "cannot complain that his constitutional rights have been violated if his privileges are withdrawn."[20] *Rose v. Haskins, supra*, 388 F.2d at 95. This theory treats revocation of parole as a matter of administering prison discipline.

> The constitutional rights . . . which he claims were violated apply *prior* to conviction. They are not applicable to a convicted felon whose convictions and sen-

[20] A third traditional theory is that the terms of a probation or parole order constitute a contract between the sovereign and the convict in which the latter agrees to various conditions, one of which may be revocation at the will of the sovereign without hearing or notice. Any analogy to the law of contracts, indicates that this "agreement" is little more than a contract of adhesion. See *Morrissey* v. *Brewer, supra*, 443 F.2d at 962-963; *Hahn* v. *Burke, supra*, 430 F.2d at 104-105; *Rose* v. *Haskins, supra*, 388 F.2d at 99-100 (Celebrezze, *J.*, dissenting).

tences are valid and unassailable and whose sentences have not been served. *Rose* v. *Haskins, supra,* 388 F.2d at 95.

This theory is fallacious in two respects. First, it wrongly assumes that incarcerated persons are not entitled to the safeguards of the Constitution. But courts have held time and again that the Due Process Clause applies to prisoners.[21] Particularly apposite are those cases which have held that a prisoner cannot be punished without minimum due process safeguards.[22] As the Second Circuit stated in *Sostre* v. *McGinnis, supra*:

> If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least

[21] "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated." *Johnson* v. *Avery*, 393 U.S. 483, 486 (1969).

[22] *Haines* v. *Kerner*, —— U.S. ——; 40 L.W. 4136 (Jan. 13, 1972); *Sostre* v. *McGinnis, supra*; *Nolan* v. *Scafati*, 430 F.2d 548 (1st Cir. 1970); *United States ex rel. Campbell* v. *Pate*, 401 F.2d 55 (7th Cir. 1968); *Landman* v. *Peyton*, 370 F.2d 135 (4th Cir. 1966); *Urbano* v. *McCorkle*, —— F. Supp. ——, 10 Cr. L. 2201 (D.N.J., Nov. 17, 1971); *Sinclair* v. *Henderson*, 331 F. Supp. 1123 (E.D. La. 1971); *Landman* v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Gluchette* v. *Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Meola* v. *Fitzpatrick*, 322 F. Supp. 878 (D. Mass. 1971); *Wright* v. *McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970); *Carter* v. *McGinnis*, 320 F. Supp. 1092 (W.D.N.Y. 1970); *Dabney* v. *Cunningham*, 317 F. Supp. 57 (E.D. Va. 1970); *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *Morris* v. *Travisono*, 310 F. Supp. 857 (D. R.I. 1970); *Rodriguez* v. *McGinnis*, 307 F. Supp. 627 (N.D. N.Y. 1969), *aff'd*, —— F.2d —— (Docket 34567, 2d Cir., Jan. 25, 1972) (*en banc*); *United States ex rel. Hancock* v. *Pate*, 223 F. Supp. 202 (N.D. Ill. 1963).

be premised on facts rationally determined . . . In most cases it would probably be difficult to find an inquiry fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions. 442 F.2d at 198.

Indeed, *Sostre*, in holding that due process requires a hearing before good time can be taken from a prisoner, established that due process applies to punishment affecting conditional liberty *in the future*.[23] Consequently, due process must certainly be applied to conditional liberty presently enjoyed.

Those cases which have held that a prisoner who is to be transferred from a prison to an institution for the criminally insane must be afforded complete constitutional protections, also weaken the "custody" theory. *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *United States ex rel. Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir. 1969). The rationale of these cases is that a prisoner's form of custody cannot be drastically changed without his being afforded the protections of due process.[24] It seems clear; therefore, that the parolee or probationer who enjoys his freedom on the streets but who is suddenly seized and re-imprisoned is necessarily entitled to equal due process safeguards. It

[23] *Sostre* v. *McGinnis*, *supra*; *Nolan* v. *Scafati*, *supra*, n. 22; *United States ex rel. Campbell* v. *Pate*, *supra*, n. 22; *United States ex rel. Mosher* v. *LaVallee*, 321 F. Supp. 127 (N.D.N.Y. 1970); *Carothers* v. *Follette*, *supra*, n. 22; *Rodriguez* v. *McGinnis*, *supra*, n. 22; *Medlock* v. *Burke*, 285 F. Supp. 67 (E.D. Wisc. 1968); *United States ex rel. Hancock* v. *Pate*, *supra*, n. 22.

[24] See also *Williams* v. *Robinson*, 432 F.2d 637 (D.C. Cir. 1970); *Covington* v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Edwards* v. *Schmidt*, 321 F. Supp. 68 (W.D. Wisc. 1971).

should also be noted that parolees and probationers are entitled to constitutional protections while actually on parole. See e.g., *Poith* v. *United States*, —— F.2d ——, 10 Cr. L. 2244 (10th Cir. Dec. 13, 1971); *Sobell* v. *Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971), both of which struck down conditions which were held to impinge on the parolees' First Amendment rights.

Secondly, the "constructive custody" theory is neither logical nor realistic. Surely the status of a man free on the streets, living with his family, holding a job, restricted only in certain areas of his life and required to report to his supervising officer weekly or monthly, is entirely different from the status of a man locked behind bars. The prisoner is isolated from family and friends, cannot earn money to support himself or his family, is subject to a multitude of rules and regulations that regiment every aspect of his life, has no privacy, no normal sexual outlets, and no control over his freedom or his life. *Morrissey* v. *Brewer, supra*, 443 F.2d at 961, n. 18 (Lay, *J.* dissenting); see also, Note, *Re-Arrest of Parolees, Constitutional Considerations*, 46 Wash. L. Rev., at 6.

Furthermore, if it were true that the parolee or probationer continued to be in the custody of the State much as a prisoner, one would expect that he would be entitled to receive credit against his sentence for the time he was released. This, however, is rarely the case. See, Arluke, *A Summary of Parole Rules*, 15 Crime and Delinquency 267 (1969); Note, *Parole Revocation in the Federal System*, 56 Geo. L.J. 705, 732-733 (1968).

Therefore, since a prisoner in actual custody is granted constitutional safeguards, including the right to notice and a hearing, before being punished or subjected to a transfer

which radically alters his status, these same protections must apply to the man who is only fictionally "in custody" while on probation or parole.

IV.

Due process requires a hearing upon revocation of probation or parole.

A. *The Grounds for Finding a Violation of the Conditions of Probation or Parole.*

The need for a hearing upon revocation of probation or parole is emphasized when one recognizes how often revocation is based upon violation of petty requirements bearing little or no relation to common concepts of anti-social behavior.

> Some parole conditions are moralistic, most are impractical, others impinge on human rights, and all reflect obsolete criminological conceptions. On the whole they project a percept of a man who doesn't exist. Arluke, *op. cit. supra*, 15 Crime and Delinquency at 269.

Conditions of parole or probation which can result in revocation can include consumption of liquor, changing job or residence, marriage without permission, driving a car, indebtedness, violating a curfew, contracting a venereal disease, or leaving a prescribed location.[25] Revocation for violating such patently trivial conditions is common in every state, as illustrated in Appendix B.

---

[25] See Appendix B, charting frequency of common parole conditions in each state.

The violations themselves are also often subject to factual dispute. This Court has recently reversed the revocation of a man's parole for associating with other ex-convicts when the only proof of the violation consisted of the fact that the ex-convicts were employed at the same establishment where the parolee worked. *Arciniega v. Freeman*, 404 U.S. 4 (1971) (*per curiam*). In *Fleming v. Tate*, *supra*, the parolee was reimprisoned for leaving the state without permission, to attend his sister's funeral. He was not permitted to produce testimony from his parole sponsor who had given him permission to go, under the mistaken belief that he had the authority to do so. Conditional release was revoked in *Moore v. Reid*, 246 F.2d 654 (D.C. Cir. 1957), on the ground that writing letters to a former cellmate violated a parole condition forbidding association with persons having a known criminal background.[26]

Thus, the nature of a violation can often be not only inconsequential but can turn on purely factual questions which could be readily refuted if a hearing were allowed.

B. *The Requisites of a Hearing.*

This Court long ago emphasized that the "fundamental requisite of due process of law is the opportunity to be

---

[26] See also *United States ex rel. Bey v. Connecticut State Board of Parole*, *supra*, n. 1 (revocation based primarily on suspicions and fears about potential future misconduct); *Genet v. United States*, 375 F.2d 960 (10th Cir. 1967) (revocation for failure to find sufficient income to maintain ordered level of support payments for family); *United States v. Taylor*, 321 F.2d 339 (4th Cir. 1963) (revocation for failing to pay fine); *Goolsby v. Gagnon*, *supra*, n. 1 (revocation primarily for leaving parole supervisor's office without permission); *People ex rel. Menechino v. Warden*, *supra*, n. 1 (revocation for "consorting" with persons with criminal record and denying this alleged fact).

heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). In *Goldberg* v. *Kelly*, *supra*, the Court defined the minimal requisites of a hearing as

> timely and adequate notice detailing the reasons for a proposed [change in status], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. 397 U.S. at 267-268.[27]

In the revocation of probation or parole, the notice must give specific and detailed descriptions of the conduct complained of by the authorities. See *Groppi* v. *Leslie*, —— U.S. ——, 40 U.S.L.W. 4151 (Jan. 13, 1972); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J. concurring); *In re Oliver*, 333 U.S. 257, 273 (1948); *Sostre* v. *McGinnis*, *supra*, 442 F.2d at 203; *Escalera* v. *New York City Housing Authority*, *supra*.

The accused must be allowed to confront his accusers. *Goldberg* v. *Kelly*, *supra*; *Berger* v. *California*, 393 U.S. 314 (1969); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Greene* v. *McElroy*, 360 U.S. 474 (1959); Davis, §7.05 (1958), *supra*, n. 12. This is especially crucial in a parole or probation revocation situation where the facts are disputed. When a parolee or probationer is charged with a vague violation such as "consorting,"[28] there are no statutory or judicial guidelines to follow and no interpretations

---

[27] See generally: W. Cohen, *Due Process*, 42 U. Colo. L. R., *supra*, n. 8; Pugh and Carver, *Due Process and Sentencing: from Mapp to Mempa to McGautha*, 49 Tex. L. Rev. 25 (1970).

[28] See discussion, pp. 17-18, *supra*, and Appendix B.

of parole conditions to which one can turn. Parole officers may be overworked and improperly trained, and often they are insufficiently informed about a parolee's activities.[29] They may even display bias or animosity towards the parolee or probationer. For these reasons, it is imperative that the accuser and the accused meet face to face to allow the board to ascertain the truth.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. *Greene* v. *McElroy*, *supra*, 360 U.S. at 496.

In *United States ex rel. Carioscia* v. *Meisner*, *supra*, n. 1, the parole board's failure to produce its sources of information or to allow the petitioners to examine reports made to the board was challenged. It was held that the board's failure to produce its sources or, in the alternative, its reports, violated the petitioners' Sixth Amendment right to confront the witnesses against them. In reaching that con-

---

[29] Task Force Report, *Corrections*, *supra* n. 7, at 6, 70, 97-99; Dawson, *Sentencing*, *supra* n. 8, at 317-338.

clusion, the court observed that although the board already provided some procedural safeguards—a hearing was held reasonably soon after the alleged violation, and reasonably near the site of the violation, and the accused could retain counsel and call voluntary witnesses—more was necessary: "due process requires an opportunity for the aggrieved person to confront and cross examine adverse witnesses." 331 F. Supp. at 649, citing *Goldberg* v. *Kelly, supra.*

Opportunity for the presentation of witnesses on behalf of the probationer or parolee is also an important safeguard against unfair or arbitrary decisions. It allows the man the opportunity to corroborate his own version of events, to prove an alibi defense, and in general to overcome the inherent suspicion as to his veracity by reason of his incarceration. It is not contended that the probationer or parolee should have subpoena powers. Where, however, material witnesses voluntarily come forward on his behalf, there is no logical reason for excluding their sworn testimony from a hearing body seeking to learn the truth. This appears to be such a basic precept of fairness that courts often conclude, without more, that voluntary witnesses must be allowed, as the *Carioscia* court held. The Fourth Circuit Court of Appeals, in *Bearden* v. *South Carolina, supra*, n. 1, has agreed: " . . . the parolee was entitled to notice of his alleged default and opportunity to rebut the same, including the right to be heard *pro se* before someone representing the board, and to *present witnesses in his own behalf*," 443 F.2d at 1095 (emphasis added).

Finally, the decision reached by the Board must be based on evidence adduced at the hearing:

> . . . which the prisoner has had the opportunity to refute . . . To permit punishment to be imposed for

> reasons not presented and aired would invite arbitrariness and nullify the right to notice and a hearing . . . The practice of going outside the record in search of bases for punishment must cease. *Landman* v. *Royster, supra,* 333 F. Supp. at 653-654.

See also *Goldberg* v. *Kelly, supra,* 397 U.S. at 271; *Escalara* v. *New York City Housing Authority, supra,* 425 F.2d at 862-3.

Moreover, there must be some minimum standard of proof to justify a decision. *Arciniega* v. *Freeman, supra, Thompson* v. *Louisville,* 362 U.S. 199 (1960). In *Arciniega* this Court summarily reversed a judgment of the 9th Circuit upholding the revocation of probation for violating its conditions by associating with ex-convicts who were employed at the same place as the probationer. It held that there must be "satisfactory evidence" of a violation, and that "occupational association, standing alone, [could not be] satisfactory evidence on non-business association violative of the parole restriction." This case suggests that, not only must there be "satisfactory evidence" of a violation of conditions of probation or parole, but also that such conditions must be reasonably construed.[30]

---

[30] Dawson, *supra,* p. 367. See also, Appendix B.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

MELVIN L. WULF
MICHELE HERMANN
HERMAN SCHWARTZ
ROBERT PLOTKIN
RICHARD SINGER
JOEL GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010
Attorneys for Amicus Curiae

February 1972